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IN THE

Supreme Court of the United States

October Term, 1967

No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR REHEARING

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
Of Counsel

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Petitioner prays that the Court grant rehearing of its March 18, 1968 decision affirming, by an equally divided Court, petitioner's conviction and sentence to twenty years in prison.

Reasons for Granting Rehearing

I

Subsequent to the Court's ruling in petitioner's case, certiorari has been granted to consider, in the case of another state prisoner, those circumstances which result in an identification procedure violating the Due Process

Clause of the Fourteenth Amendment, *Foster* v. *California*, No. 638 Misc., 36 U. S. L. Week 3374 (3/25/68). *Foster* involves a lineup which is alleged to have been unconstitutionally conducted. As petitioner was not accorded the elementary protection of a lineup—and the record is barren of evidence justifying the failure to hold one—reversal in *Foster* would, *a fortiori*, affect, if not determine, final resolution of petitioner's constitutional claim. An intervening circumstance such as "the fact that the same or a related issue has come before the court in other cases still pending" is a common ground for grant of rehearing. Stern and Gressman, Supreme Court Practice, 3rd Ed. 389; see *Pickett* v. *Union Terminal Co.*, 313 U. S. 591 (1941); 314 U. S. 704 (1941); 315 U. S. 386, 389, 394 (1942). It is plainly appropriate and just that the results in these two cases conform. Unless it is beyond doubt that principles announced in *Foster* will not bear upon petitioner's claim, this petition should be granted.

That affirmance is the product of an equally divided Court further supports granting of this petition. The Court has granted rehearing most often in cases such as this where it could not, initially, agree on a decision. Stern and Gressman, *supra*, at 387. The present result works a harsh penalty on a minor without articulate decision of, or agreement as to, two substantial federal claims. It may be that over the years some few men will have to go to prison because this Court may upon occasion be unable to reach a decision, but such a manner of reaching a result has always been avoided except where absolutely necessary and it is not absolutely necessary where review has been granted with respect to what may be a controlling principle of law.

II

The Court in *Simmons* v. *United States,* No. 55, O. T. 1967 reaffirmed the approval of *Palmer* v. *Peyton,* 359 F. 2d 199 (4th Cir., 1966), given in *Stovall* v. *Denno,* 388 U. S. 293, 301, 302 (1967). Petitioner submits that the facts of his case are simply not sufficiently distinguishable from *Palmer* to support a difference in result:

Critical Circumstances	*Palmer*	*Biggers*
Gap between crime and identification	1 day	7 months
Time during which victim could observe criminal	15-30 minutes	10-30 minutes
Initial opportunity to observe	assailant's head covered by paper bag	opportunity limited by darkness
Voice identification	spoke words used by assailant	spoke words used by assailant
Physical identification	none attempted	yes
Lineup	none	none
Justification for no lineup	none	none
Evidence corroborating guilt	assailant was wearing an orange shirt and Palmer was wearing a similar shirt when arrested; witness stated that Palmer confessed to the crime	none: an eyewitness failed to identify Biggers

Significantly, recent decisions of the New York Court of Appeals and the California Supreme Court read *Palmer* and *Stovall* v. *Denno, supra,* in a way which would require a reversal here, and which suggest (when the grant of certiorari in *Foster* is considered) that Archie Nathaniel Biggers may, fortuitously, be only the hapless victim of a short-lived restrictive interpretation of the due process obligation of the states to provide for fair identification procedures. In *State* v. *Ballott,* 233 N. E. 2d 103 (1967) for example, the facts surrounding the identification are strikingly similar to petitioner's case:

> Miriam Seidman and Rose Scipone worked for the M. N. Axim Lumber Company in Queens County. It was the task of those employees, each Friday, to drive to the bank and pick up the company payroll of about $5,000 and then return to the company's offices with the money in an envelope. On the Friday in question, January 18, 1963, as they were about to alight from their car, a Negro, wearing a hat and a heavy overcoat, with turned up collar, appeared at the window and demanded the envelope, threatening to shoot if it was not turned over to him. Frightened, Mrs. Seidman handed him the envelope and Mrs. Scipone gave him her purse containing $27. The robber then fled.
>
> The defendant was arrested a year later, having been implicated in the robbery by a man named Doyle. The latter, questioned a short time after the robbery, declared that, having learned of the payroll procedure from one of the lumber company's employees, he and the defendant Ballott had planned the commission of the crime. Doyle pleaded guilty to conspiracy to commit larceny, a misdemeanor, and subsequently testified against the defendant.

> Mrs. Scipone testified upon the trial that she had not seen the face of the robber and only Mrs. Seidman identified the defendant as the man who had held them up. It was disclosed, during the course of her testimony, that in January, 1964, a year after the robbery, the police had exhibited to her the defendant, alone in a room in the station house, and that she had then stated that he was the person who committed the robbery. It also appeared that she had identified the defendant only after he had, at her request, donned a hat and a heavy coat—similar to those worn by the robber—and uttered the words—somewhat like those spoken—"give me the money, give me the envelope." Mrs. Seidman acknowledged that she made her identification only after she had heard the defendant speak.

In the California case, the court reversed the conviction even though a lineup was held, *People* v. *Caruso*, —— Cal. 2d ——, 2 Crim. L. Rptr. 3135 (1/26/68):

> But the uncontradicted testimony of all those who viewed the lineup demonstrates that it was conducted under circumstances which could only have suggested to Butkus and Seeley that defendant was the man to be charged with the offense. Defendant is of imposing stature, being 6 feet 1 inch tall, and weighing 238 pounds. He is of Italian descent, with a very dark complexion, and has dark wavy hair. The two victims, the officer in charge of the investigation, Sergeant Allen, and defendant all testified that the other lineup participants did not physically resemble defendant. They were not his size, not one had his dark complexion, and none had dark wavy hair. During the robbery both Seeley and Butkus had noted the driver's

> large size and dark complexion, and, if they were to choose anyone in the lineup, defendant was singularly marked for identification. We can only conclude that the lineup was "unnecessarily suggestive and conducive to irreparable mistaken identification" (*Stovall* v. *Denno* (1967) supra, 388 U. S. 293, 302), and we hold that its grossly unfair makeup deprived defendant of due process of law. (*Stovall* v. *Denno, supra*).

Of course, nothing decided in these cases binds this Court. But the ready, and we submit convincing, application of *Stovall* by the highest courts of New York and California supports a serious re-examination of petitioner's claim. While this Court's precedents are not always capable of mechanical application to subsequent cases, surely it is no accident that both state courts have applied *Stovall* to identification procedures which under no reasonable construction were significantly more likely to produce "irreparable mistaken identification" than those employed by the Nashville police to suggest the guilt of a sixteen year old boy.

In addition, as the Supreme Court of California found in *People* v. *Caruso, supra,* the due process infirmity of suggestive identification procedures is enhanced where the record shows a serious doubt as to the reliability of the judgment of guilt. In *State* v. *Ballott, supra,* and *Palmer* v. *Peyton, supra,* there was independent evidence connecting the defendants with the crime; in Biggers' case, however, a questionable identification of one with no criminal record stands uncorroborated. The state, moreover, treated the jury in a manner which substantially impaired its capacity to appr e that identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case (R. 196, 197); then the jury selected

from those exposed to the papers was reminded of the harmful stories by the prosecution on voir dire (R. 58, 59, 175, 215) and at trial (R. 17); police officers were permitted to testify again and again to the facts of identification although they were not controverted; finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as "appealing to racial prejudice" and which the court found to be error—but non-reversible (R. 183, 209, 210). Petitioner respectfully submits that an uncorroborated identification so frail requires a guilt finding process of greater integrity than shown by this record.

CONCLUSION

For the foregoing reasons petitioner requests that the Court grant rehearing and reverse the judgment below.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
Of Counsel

Certificate

I, MICHAEL MELTSNER, a member of the Bar of this Court and counsel for petitioner herein, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

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Attorney for Petitioner

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